

STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

_____, Student, by and through Parents
_____. and _____,
Petitioner,
v.
Gilbert Unified School District,
Respondent.

No. 07C-DP-_____-ADE

ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: Convened on September 25, 2007 and on September 26, 2007, followed by post-hearing legal submissions; the hearing record concluded after the Tribunal receipt of the court reporter's prepared transcript and the Administrative Law Judge's review and consideration of the hearing record and applicable case law.

APPEARANCES: Petitioners, Parents _____ and _____, appeared on behalf of themselves and Student _____, and were represented by attorney Laura B. Monte, Donaldson and Associates, PC.

Attorney Robert D. Haws, Gust Rosenfeld, PLC, appeared on behalf of the Gilbert Unified School District, accompanied by Tommi Pierce, Special Education Director, Gilbert Unified School District.

Court Reporter Doreen C. Borgmann of Griffin & Associates, LLC., recorded the proceedings.¹

WITNESSES:² For Petitioner: _____, Father; _____, Mother; _____, School Bus Driver, current school year ("Current School Bus Driver"); _____, School Bus Driver, prior school year ("Prior School Bus Driver"); _____, R.N., _____ School School Nurse ("School Nurse"); _____, M.D.

For Respondent School District: _____, Physical Therapist ("Physical Therapist"); _____, _____ School Special Education Teacher ("Special Education Teacher"); _____, former Paraprofessional at _____ School; Daren Hess, Transportation Coordinator with Com Trans; _____ School Assistant Principal ("Assistant Principal"); _____, _____ School School Psychologist ("School Psychologist"); _____, Secondary Special Education Coordinator for Gilbert Unified Schools ("Secondary Special Education

¹ By virtue of Petitioner's pre-hearing request for a written record of the due process hearing proceedings, the parties agreed that the court reporter's record would be the official record of the hearing. This tribunal has, by statute, made a digital recording of the proceedings, which was available at no charge to the court reporter, and which was also used for purposes of reviewing testimony during the Administrative Law Judge's consideration of the matter. During the process of preparing this decision, the Administrative Law Judge noted the existence of some probable textual errors (perhaps misunderstood words of the speakers) within the transcript; however, the Administrative Law Judge did not verify the record text such as by listening to the entire audio record.

² To avoid the use of proper names, in order to protect confidentiality, witnesses are designated a generally descriptive title to be used in the body of the Decision with the exceptions being non-Gilbert Unified employees. The proper names are grouped here for ease of redaction.

Coordinator"); Thomas A. Dempster, Ph.D., Gompers School Principal; Jennifer Johnson, Ph.D., Out-of-District Placement Coordinator ("Out-of-District Placement Coordinator"); Tommi Pierce, Director of Special Education for Gilbert Unified Schools ("Director of Special Education").

ADMINISTRATIVE LAW JUDGE: Kay. Abramsohn

Parents bring this due process action, on behalf of Student, to challenge the determination made by the IEP Team at Respondent Gilbert Unified School District, that Student's placement should be changed for academic year 2007-2008 from a self-contained multi-disciplinary classroom at ~~McQueen High~~ School within district boundaries to a private day school setting at Gompers Center outside district boundaries; this determination also involved an age-out (transition) issue and a transportation (related service) issue for which Parents are not in agreement due to the location of the proposed placement.

The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004),³ and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 300,⁴ as well as the Arizona Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.⁵

Petitioner filed the due process complaint notice on June 13, 2007. Pre-hearing conferences were held on July 24, 2007 and on September 4, 2007, and the parties discussed the process and the issues presented in the complaint. By the time of the

³ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004," IDEA 2004 became effective on July 1, 2005.

⁴ The current federal regulations became effective October 13, 2006. For a time frame associated with Student's IEPs, the pre-October 2006 regulations would be applicable and would usually be applied and cited to in decisions dealing with issues relating to the time frame between the effective date of the IDEA 2004 and the effective date of the current regulations. However, a comparison of the former and current regulations that might apply to the issue in this case shows that they are substantially the same, the differences being only re-numbering and minor grammatical changes. Therefore, because there is no material difference, this Decision will apply and cite the current regulations.

⁵ It is noted that these rules are being revised to comport with the 2005 changes in federal and Arizona special education law, but have not yet been published by the Arizona Secretary of State.

1 hearing in September, only one issue for hearing remained: placement, due to Parents'
2 disagreement with the proposed transportation services.⁶

3 Parents' disagreement centers on the proposed placement's location which
4 would necessitate two times a day a lengthy commute, which they fear and argue *could*
5 *potentially* cause medical issues for Student. Parents argue that they were not given a
6 *choice* at the March 25, 2007 IEP meeting with regard to the proposed placement and
7 that, given a choice, they would have Student continue to receive only the agreed-upon
8 IEP services at [REDACTED] School until Student ages-out.⁷ Parents offered to
9 provide additional assistance within the classroom, in the form of an aide (from
10 Student's long term care insurer), in order to have Student remain at [REDACTED]
11 School until he ages-out.⁸

12 District argues that Student has made no educational or functional progress in
13 his four years at [REDACTED] School under the existing agreed-upon IEPs and is
14 regressing in physical areas (clonus, spasms, and muscle tone). Therefore, District
15 argues Student's current placement at [REDACTED] School no longer offers a free
16 and appropriate public education ("FAPE"), and as a result District argues that it is
17 under an obligation to seek and offer a proposed placement that does offer, or even
18 has some chance of offering, FAPE as a part of their rights and obligations under the
19 IDEA. District argues that to leave Student at [REDACTED] School, and for the due
20 process hearing process to order that Student remain at [REDACTED] School, would
21 certainly deny FAPE to Student. District's position is that Student's placement is
22 appropriately proposed to be Gompers Center if parents want FAPE provided to their
23 son by District. Further, District's position is that the proposed placement is just that, a
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27 ⁶ Parents do not consider the proposed placement at Gompers Center either as the determined or even a
28 preferred age-out location for Student because Parents have not come to any conclusions or decisions as
29 to what they would *like* to see, do, or have for Student upon his reaching the age of 22.

30 ⁷ There is no indication in the hearing record that the District intends to "graduate" Student; rather, all
indications are that Student will age-out of the District's special education program.

⁸ District indicated that if additional assistance was needed at the classroom in order to provide FAPE to
Student, if Student is to remain at [REDACTED] School, that District was responsible for providing such
and not Student's parents.

1 proposed placement, and should the transportation issue prove to be problematic, that
2 the Team would convene to review Student's placement.⁹

3 The parties presented testimony and Exhibits at the hearing on September 25
4 and 26, 2007. Petitioner presented testimony from the witnesses noted above and
5 Exhibits numbered 1 through 44, of which the following were admitted into the record: 2,
6 3, 4, 9, 10, 11, 12, 14, 15, 16, 17, 18, 24, 25, 26, 28, 29, 30, 32, 35, 40, 41, 42, 43 and
7 44.¹⁰ Petitioner's Exhibit 31, through which the parties elicited testimony in comparison
8 to Exhibit 30 and Exhibit D, is considered to be admitted to the record by the
9 Administrative Law Judge. District presented testimony from the witnesses noted
10 above and Exhibits numbered A through M.¹¹

11 The Administrative Law Judge has considered the entire record, including the
12 testimony and exhibits,¹² and now makes the following Findings of Fact, Decision, and
13 Order finding that Petitioner has not met the burden to show that District's proposed
14 placement, including the proposed transportation services, is an inappropriate
15 placement for Student, and therefore District's proposed placement for Student,
16 including the proposed transportation services, is an appropriate placement under the
17 IDEA.

18 FINDINGS OF FACT

19 1. In March 2002, Student was involved in an automobile accident.¹³
20 Student suffered extensive injuries, which left him in a coma for over 4 months.

21
22 ⁹ The Administrative Law Judge presumes that such would also be the case in the event the Gompers
23 Center placement itself did not provide FAPE. While the Administrative Law Judge does not find this
24 stated position to be disingenuous, it is noted that the hearing record demonstrated that, once placed at
25 Gompers, Student's IEP Team at Gompers will be composed of different persons than the current team
26 members and the District will likely only have one member representative on a Gompers IEP Team.

27 ¹⁰ These Exhibits are listed and briefly described in Petitioner's LIST OF WITNESSES AND EXHIBITS timely
28 filed on September 17, 2007. Exhibits 1, 5, 6, 7, 8, 13, 17, 19, 20, 21, 22, 23, 27, 31, 33, 34, 36, 37, 38
29 and 39 were not admitted for various reasons noted on the record. Petitioner's Exhibit 43 was noted to be
30 the same as Respondent's Exhibit I. Petitioner's Exhibit 41 was noted to be the same as Respondent's
Exhibit G. Petitioner's Exhibit 13 was illustrative of information provided during sworn testimony, but was
not admitted into the record.

¹¹ These Exhibits are listed and briefly described in RESPONDENT'S LIST OF WITNESSES AND EXHIBITS timely
filed on September 17, 2007. Petitioner stipulated to the admission of Respondent's proposed exhibits.

¹² The Administrative Law Judge has read each admitted Exhibit, even if not mentioned in this Decision.
The Administrative Law Judge has also considered the testimony of every witness, even if not mentioned
in this Decision.

¹³ At the time of the accident, Student was 14 years of age; Student's birth date is [REDACTED]

Following his hospitalization for over 7 months and 6 months at a rehabilitation facility, Student was transitioned to his home, where he resides with his family.

2. As a result of the accident, Student is diagnosed with [REDACTED], [REDACTED], and [REDACTED]. Student is non-ambulatory and confined to a wheel chair. Student is totally ADL dependent and receives his nutrition/feedings through a feeding tube.¹⁴

3. Following his rehabilitation and during the 2003-2004 school year, Student became enrolled in Gilbert Unified School District ("District").

4. Student attends [REDACTED] School, within the District.¹⁵ Pursuant to an Individualized Education Program ("IEP"), Student receives special education services in a self contained multi-disciplinary special education classroom. [REDACTED]

5. Upon his initial evaluation for special education services, Student was identified as eligible for special education under the category of [REDACTED].¹⁶

6. Upon an April 2005 re-evaluation by School Psychologist with regard to impairments and functional abilities, Student was identified as eligible for special education under the categories of [REDACTED], and [REDACTED].¹⁷ More importantly with regard to this due process complaint, upon that April 2005 re-evaluation, Student's general cognitive abilities were assessed using the Hawaii Early Learning Profile. This assessment obtained the cognitive age equivalents, primarily, of 0-3 months, and obtained the (adaptive behavior) self-help skills in the age equivalent of 0-3 months.

7. A review of Student's present levels of educational performance sections on the four available IEPs demonstrates that there has been no substantive change in Student's capabilities over the four years.¹⁸

¹⁴ District feeds Student at lunch.

¹⁵ Student lives in the attendance boundaries for [REDACTED] School, which would be his home school but which did not have the type of special education program that could handle Student's disabilities and unique needs; therefore, Student attends [REDACTED] School, which does have a self contained program. The [REDACTED] School program is the least restrictive environment for Student, given the nature and severity of his disabilities and his unique needs.

¹⁶ See Exhibit 30, IEP 2004-2005.

¹⁷ See Exhibit 31, IEP 2005-2006, and Exhibit 35, Evaluation.

¹⁸ See Exhibits 30, 31, 40 and 42, the successive IEPs.

1 8. In the classroom and in the school setting over the past four years: (a)
2 Student is [REDACTED] and requires maximum assistance from teacher
3 and staff to participate in any classroom or school activity; (b) [REDACTED]
4 [REDACTED] purposeful movement of his head, arms or legs;
5 [REDACTED] staff members; (c) [REDACTED]
6 [REDACTED]; (d) [REDACTED] control;¹⁹ (e) Student has not demonstrated any expressive or receptive communication
7 ability and has not shown reaction to audio, visual, olfactory or tactile stimuli; and, (f)
8 [REDACTED] (making it increasingly difficult for the school personnel
9 to perform, appropriately, Student's range of motion program).²⁰

12 9. A review of the quarterly reports regarding Student demonstrates that
13 Student has not made any progress with his agreed-upon IEP goals and objectives.²¹
14 Over the four years, and upon seeing no progress with Student's initial goals and
15 objectives, the IEP Team had modified the goals and objectives to a minimum goal
16 possible for Student's age equivalent.²²

17 10. Student's IEP goals and objectives are designed to give Student an
18 opportunity to show responsiveness. Student receives instructions in functional,
19 communication, social and life skills in place of completing AIMS educational level
20 requirements; Student has no educational/academic curriculum level goals. The Team
21 indicated in March 2007, that "[d]ue to [Student's] functioning level at present time, he
22 will not be able to meet proficiency levels set by GPS for AIMS for his grade level."²³

25 ¹⁹ Based on the hearing record and the testimony of all relevant witnesses with regard to Student in the
26 school setting, this is the only fact on which the parties disagree. Student's parents believe that Student is
27 sometimes able to use his right hand for purposeful movement; however, the hearing record show this to be inconsistent use.

28 ²⁰ "Clonus", or clonoplasm, is a form of movement marked by contractions and relaxations of a muscle,
29 occurring in rapid succession, after forcible extension or flexion of a part. STEDMAN'S POCKET
30 MEDICAL DICTIONARY, Williams & Wilkins, 1987.

²¹ See Exhibits C, 32, D and 44, the successive Quarterly Reports.

²² Comparison, Exhibits C and 32.

²³ See Exhibit 42, IEP 2007-2008.

1 11. In the non-educational arena (functional, communication, social and life
2 skills areas) while at school, Student receives the following: (1) an established range of
3 motion program; (2) alternative positioning protocols, including Hoyer lift transfers; (3)
4 time standing, on his standing table (or tilt table) at varying intervals; (4) inclusion in
5 various language stimulating activities; (5) inclusion in adaptive physical education
6 class; (6) nursing services as needed; and (7) aide services as needed to meet the
7 stated goals and objectives.²⁴ Student requires maximal assistance in order to
8 participate in these classroom and school activities.

9 12. Student is provided the following related services: (1) speech consult for
10 30 minutes a month; (2) physical therapy direct services for 30 minutes a semester; (3)
11 physical therapy consult services for 30 minutes a semester; and (4) transportation.

12 13. On January 24, 2007, members of the IEP Team met to discuss
13 Student's present needs and future transition.²⁵ Student's Mother attended this
14 meeting. Special Education Teacher, School Nurse, and School Psychologist each
15 indicated the lack of Student's progress and some physical regression in muscle tone.
16 Assistant Principal expressed his concerns regarding Student's lack of progress and the
17 Team's need "to look towards what is most appropriate in meeting [Student's] needs."
18 Out-of-District Placement Coordinator discussed possible appropriate private day
19 programs as a means of servicing Student's unique needs.²⁶

20 14. On March 5, 2007, the IEP Team met to discuss Student's IEP for 2007-
21 2008 (i.e., for the periods of March 6, 2007 - May 24, 2007 and May 25, 2007 - March
22 25, 2008). Parents attended this meeting.

23 15. The proposed IEP for 2007-2008 contains carryover goals and objectives
24 for Student as the prior IEP and sets forth carryover present levels of functioning as the
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27 ²⁴ See Exhibit 42, IEP 2007-2008.

28 ²⁵ See Exhibit 41. A review of Exhibit 31, IEP 2005-2006, shows that the IEP Team created Student's
29 basic transition plan and projections in March 2005.

30 ²⁶ Her role is to consult with all District campuses and provide information about possible out-of-district
options after reviewing a student's program needs and circumstances; additionally, she serves as a case
manager for the Districts' students being educated in private special education schools and residential
treatment centers.

1 prior IEP; additionally, the proposed IEP sets forth the transition plan to place Student
2 at Gompers Center for academic year 2007-2008.²⁷

3 16. The non-unanimous consensus of the IEP Team on March 5, 2007 was
4 that Student's proposed placement for academic year 2007-2008 would be Gompers
5 Center. At hearing, the school staff members of the IEP Team opined, essentially, that
6 they believed the Gompers Center placement would be an appropriate placement and
7 would offer an opportunity for Student to achieve the stated IEP goals and objectives;
8 these opinions were partially based on Student's continued lack of responsiveness and
9 failure to make any progress despite the staff's continued best efforts.²⁸

10 17. Due to the Parents' disagreement with the proposed placement, Petitioner
11 filed his due process complaint notice. Petitioner has remained in the stay-put
12 placement of [REDACTED] School pending finalization of the due process complaint.

13 18. Parents toured Gompers Center with Out-of-District Placement
14 Coordinator.²⁹ At that time, Parents expressed their concern with regard to the distance
15 and time it would take to transport Student from the family home to Gompers Center.

16 19. Gompers Center is a private nonprofit facility that provides schooling,
17 rehabilitation and other services to persons with disabilities;³⁰ the facility does not
18 educate any nondisabled persons. Gompers Center employs speech language
19 pathologists, an occupational therapist, recreational therapists (who facilitate, treat
20 and/or provide the various functional therapies offered to clients and students), and is
21 looking to hire an in-house physical therapist.³¹ Physical therapy needs are currently
22 addressed through school districts sending their therapists to Gompers Center for
23 students' service needs.

24 20. Gompers Center is on the west side of Phoenix on 27th Avenue between
25 Glendale Avenue and Maryland Street (at 6601 N. 27th Avenue). The closest major
26 cross roads of Student's home are [REDACTED] and [REDACTED] in Gilbert. Neither

27 ²⁷ See Exhibit 42, IEP.

28 ²⁸ Implementation of the existing, or past, IEPs is not at issue in this matter.

29 ²⁹ After receiving information from District with regard to the possible private placements for Student,
30 Parents toured two other day facilities, neither of which had facilities that could provide services for
Student's unique needs.

³⁰ See Exhibit A, Gompers Center information regarding its various programs.

³¹ Dr. Dempster's testimony, Transcript, p. 471 and 485.

1 party provided the actual mileage door to door; however Daren Hess, the
2 Transportation Coordinator with Com Trans estimated the mileage at 30 to 35 miles; he
3 further estimated the drive time to be one hour with traffic and to be less than one hour
4 without traffic.³²

5 21. Thomas A. Dempster, Ph.D., Gompers School Principal oversees the
6 education and safety of the students at Gompers Center. After considering Student
7 (through conversations and e-correspondence from Out-of-District Placement
8 Coordinator) and the potential benefits of Gompers Center's programs for Student, Dr.
9 Dempster believes that Gompers Center "is more than capable to accommodate
10 [Student] at this time."³³

11 22. The Gompers Center provides, for purposes of program placement, an
12 encompassing evaluation of any person proposed for placement. Student has not yet
13 undergone such evaluation or review.³⁴

14 23. Gompers Center offers therapeutic interventions which include the
15 following: (1) an adapted aquatic swim program; (2) vestibular, proprioceptive and
16 tactile stimulations; (3) physical therapy; (4) occupational therapy; and, (5) speech
17 therapy. Gompers Center also offers adult day training and adult vocational programs.

18 24. The Gompers Center's aquatic therapy program requires an evaluation of
19 any student proposed for such therapy. Student has not yet been evaluated for such
20 program; the aquatic evaluation is done in three sessions after a student is enrolled.³⁵
21 However, with regard to aquatic opportunity, Parents have indicated that Student is
22 taken into the family pool at the family home.³⁶ Based on the information available to
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24 ³² Com Trans is a private transportation company contracted with six different school districts, and the
25 company specializes in special needs transportation. Mr. Hess' testimony, Transcript, p. 375.

26 ³³ Dr. Dempster's testimony, Transcript, p. 478 and 479.

27 ³⁴ At the March 5, 2007 IEP Team meeting, Out-of-District Placement Coordinator apparently represented
28 the Gompers Center program. The hearing record does not show whether a representative from
29 Gompers Center was invited to the March 5, 2007 meeting.

30 ³⁵ Dr. Dempster's testimony, page 475, Transcript.

³⁶ Secondary Special Education Coordinator testimony, Transcript, p. 464. This testimony was not
explored in detail; therefore, little information is available for consideration or comparison. The
Administrative Law Judge notes that, despite taking Student into their family pool, Parents questioned the
efficacy of aquatic therapy in assisting Student achieve his IEP goals; however, the stated reason for the
parents' questioning was not based on type of therapy or its touted possible benefits but was simply that
the IEP did not contain any such goals. Mother's testimony, Transcript, p. 154.

1 him, Dr. Dempster believed that Student would be able to qualify for the aquatic therapy
2 program.³⁷

3 25. At the time of the hearing, there were 30 - 32 students ranging in age from
4 six through twenty-one years at Gompers Center; at the time of the hearing, there was
5 a space for Student. All students at Gompers Center have the opportunity for
6 preferential enrollment in the adult day programs; there is typically a waiting list for
7 enrollment for adults.

8 26. In the medically fragile classroom, Gompers Center educates its current
9 six medically fragile and mentally challenged students.³⁸ One student therein is a
10 traumatic brain injury student. Four of the five who arrive in wheelchairs are non-
11 ambulatory. Six students work on communication goals and objectives and are
12 apparently incapable of telling staff their wants and needs. In that classroom, the
13 paraprofessional staff to student ratio is one to three, in addition to the certified special
14 education teacher. The licensed practical nurse on staff is, essentially, located in the
15 medically fragile classroom during the school day.

16 27. Parents indicated that the longest period of time that Student had been
17 transported was in coming to the due process hearing;³⁹ before that, the longest time
18 they had transported Student was approximately 25 minutes (to the doctor). Student
19 currently has a 40 to 45 minute transport to [REDACTED] School; in prior year, the
20 transport time was approximately 25 to 30 minutes.

21 28. Parents' concerns with regard to transportation are founded on safety and
22 fears or risks that any of the following things might happen and, thereafter, have some
23 result on Student's now-healthy medical condition: (1) Student's head might come out
24 of the halo/restraint on his wheel chair, and his head would flop around; (2) Student's
25 spasms might cause him to not be properly seated in his chair for the transport/time; (3)
26 Student might develop pressure sores from the length of time of the transport and being

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28 ³⁷ Out-of-District Placement Coordinator also expressed her belief that Student would be a candidate for
aquatic therapy at the Gompers Center. Testimony, Transcript, p. 526.

29 ³⁸ Dr. Dempster testimony, Transcript, p. 473-475.

30 ³⁹ Parents brought Student to the first day of the due process hearing, and took Student home at the
noon/lunch break. No aide accompanied Student, other than his parents. During the time in the hearing
room, Student remained in his wheelchair and was not repositioned.

1 in one position or an improper position during that time;⁴⁰ (4) Student might develop a
2 need that the driver, in the event of an absence of an aide, would not be able to
3 address unless the driver pulled over, which would be a dangerous situation;⁴¹ and (5)
4 the traffic congestion might delay Student's arrival and cause him to be in the transport
5 van for unknown lengths of time.

6 29. Dr. [REDACTED] has been involved with Student's medial care since
7 August 2006, and has seen Student on three occasions since that time.⁴² When asked
8 about any potential risks of a one hour commute twice a day, Dr. [REDACTED] opined that
9 proper positioning for Student is important as was taking into account the timing of the
10 commute and Student's feeding(s). Dr. [REDACTED] further indicated that hands-on
11 supervision during such a commute could be beneficial but did not opine that it was
12 required. Dr. [REDACTED] opined that Student's spasticity could increase from not being
13 properly positioned for/during travel; however, he also clarified that there were no real
14 health implications from an episode of clonus.

15 30. This case raises one issue - the issue of appropriateness of the
16 placement proposed in the IEP, due to disagreement regarding the proposed
17 transportation services.

18 CONCLUSIONS OF LAW

19 1. Through the IDEA, Congress has sought to ensure that all children with
20 disabilities are offered a free appropriate public education that meets their individual
21 needs.⁴³ These needs include academic, social, health, emotional, communicative,
22

23 ⁴⁰ To the time of the hearing, Student had not experienced a complete skin breakdown; Mother testified
24 that the few times Student's skin had red pressure areas, she had been able to clear up the areas within a
25 few days. The hearing record did not contain any amount of detail about such incidents or their
26 circumstances.

27 ⁴¹ When being questioned about traffic congestion, Mother indicated Father had driven the family vehicle
28 to the hearing that day and that she is "deathly afraid of the freeways." Testimony, p. 193. This
29 information was not explored further, and no details were presented about the March 2002 accident that
30 left Student with his injuries. Therefore, the Administrative Law Judge cannot draw a conclusion that
Mother's stated fears are a result of that March 2002 accident. However, given that Student was injured in
a car accident, a reasonable person would presume that Parents continue to have some transport and
traffic concerns with regard to their child.

⁴² Dr. Tingey testimony, Transcript, beginning on page 265. Dr. Tingey had not been provided any
detailed information about Student's status within the classroom, the circumstances of the existing
transport/bus rides, or the school's current abilities or capacities with regard to the Student.

⁴³ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

1 physical, and vocational needs.⁴⁴ To do this, school districts are required to identify
2 and evaluate all children within their geographical boundaries who may be in need of
3 special education and services. The IDEA sets forth requirements for the identification,
4 assessment and placement of students who need special education, and seeks to
5 ensure that they receive a free appropriate public education. A FAPE consists of
6 "personalized instruction with sufficient support services to permit the child to benefit
7 educationally from that instruction."⁴⁵

8 2. Pursuant to IDEA, the District is required to annually review a student's
9 IEP to determine whether the annual goals are being achieved and to revise the IEP as
10 appropriate to address the lack of expected progress, the results of any reevaluations,
11 information about the student provided by parents, the student's anticipated needs and
12 any other unique matters.⁴⁶ These IEP determinations and the placement decisions are
13 made by a group of people, the IEP Team which includes the parents, knowledgeable
14 about the student, about the available evaluations and about the placement options.⁴⁷
15 One other mandate is that a school district ensure that a child's placement is
16 determined annually, is based on the IEP and is as close as possible to the child's
17 home.⁴⁸

18 3. Clearly, in Student's case, the IEP Team is in a difficult situation. The IEP
19 Team is faced with a Student who tragically came to be in his current condition of age
20 equivalent [REDACTED], who is nonresponsive to all the school personnel's best
21 efforts and who has failed to achieve any of his stated goals and objectives over a four
22 year period to the point where the goals and objectives have already been scaled back
23 to a bare minimum.⁴⁹ Unfortunately, Student's lack of functional skills exists despite all
24 the best efforts of the trained and qualified school personnel who implement the

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26 ⁴⁴ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983
U.S.C.C.A.N. 2088, 2106).

27 ⁴⁵ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

28 ⁴⁶ See 34 C.F.R. § 300.324(b).

29 ⁴⁷ See 34 C.F.R. §§ 300.116(a) and 300.501(c).

30 ⁴⁸ See 34 C.F.R. § 300.116(b).

⁴⁹ See *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458, 1467-8 (9th Cir. 1996) wherein the Court factored in the child's lack of progress on her IEP goals when looking whether to maintain an IEP placement or allow a private placement.

1 agreed-upon IEP. The hearing evidence showed that District has utilized its most
2 appropriate internal resources (the self contained multi disciplinary classroom, its
3 trained and qualified staff's capabilities and capacity, and its applicable equipment).
4 The evidence showed that for Student to continue on the same course of offered
5 education and services at [REDACTED] School is not reasonably likely to result in
6 educational benefit for him and is not reasonably likely to offer FAPE. Academically
7 (here, functionally), there is no benefit for Student to remain at [REDACTED] School.
8 The Administrative Law Judge concludes that, pursuant to its federal mandate, District
9 appropriately asks what can the District do next to offer FAPE to Student when the
10 current placement and agreed-IEP does not, or cannot, provide FAPE.⁵⁰

11 4. Student has been at [REDACTED] School as the least restrictive
12 environment ("LRE") for provision of FAPE. However, the IDEA does not provide for
13 any student to have an absolute right to be in a particular placement or location as their
14 LRE. Each proposed or alternative placement is simply required to have been
15 "considered" by the IEP Team with regard to potential harmful effect on the student or
16 potential harmful impact on the quality of the requisite services.⁵¹ LRE and placement
17 are determined after analyzing the student's unique needs (typically, the nature and
18 severity of the disabilities) against the federal mandate to educate disabled children "to
19 the maximum extent appropriate" with their nondisabled peers; the IDEA preference for
20 mainstreaming is also not an absolute.⁵² The Administrative Law Judge acknowledges
21 that the IDEA creates tension between its provisions that require education to the
22 maximum extent appropriate with nondisabled students and those that require meeting
23 all the student's unique needs. However, given Student's lack of responsiveness not
24 only in the classroom, but also at each outing and nonacademic event around campus,

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26 ⁵⁰ Sadly, this appears to be a case of a student who at this time is not able to be academically educated,
27 and also is not able to be functionally instructed in reacquiring functional skills. Parents remain hopeful
28 that Student will regain some functions, and District maintains that as part of its proposal, they are also
29 hopeful that the therapies and therapists at Gompers Center will be able to trigger responsiveness that will
30 foreshadow Student's reawakening. While the parties could have fashioned some settlement agreement
that fell short of implementing IDEA requirements, the Administrative Law Judge is bound to make
determinations within the confines of the IDEA and its purposes and mandates.

⁵¹ See 34 C.F.R. § 300.116(d).

⁵² See 34 C.F.R. §§ 300.114(a) and 300.116(d).

1 the Administrative Law Judge concludes again there is no benefit for Student to remain
2 at [REDACTED] School.

3 5. The evidence demonstrates that Student is nonresponsive in all situations
4 during the school day. While all parties would agree that his effect in the classroom is
5 not disruptive, Student is merely present in the classroom and is merely in attendance
6 at [REDACTED] School. Given Student's lack of responsiveness, staff is required to
7 offer constant and maximum assistance for all activities in class and outside class
8 around campus. This is a factor to be taken into account regarding whether Student
9 should remain at [REDACTED] School or whether a change in placement should be
10 considered and made. Finally, the evidence demonstrates that the proposed
11 placement will involve additional costs for the District in order to offer FAPE to Student.
12 This is the fourth factor to be taken into account regarding whether Student should
13 remain at [REDACTED] School or whether a change in placement should be
14 considered and made.⁵³

15 6. The evidence did not demonstrate or identify any facility or location other
16 than Gompers Center that could serve Student's current educational and related
17 services needs. While the Administrative Law Judge must conclude that Gompers
18 Center will not educate, or provide services to, Student with any nondisabled students,
19 this factor alone is not a deciding factor on an LRE placement; the hearing record
20 contains no showing that being provided the agreed-upon IEP services with all disabled
21 students will have any potential harmful effect on Student. Therefore, the
22 Administrative Law Judge concludes that the record demonstrated that Gompers
23 Center is the closest private facility that is equipped and capable to provide Student
24 with services as agreed in the IEP, and the District's proposed placement at Gompers
25 Center is determined to be the closest to home and is an appropriate LRE placement
26 for offering FAPE to Student.⁵⁴

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28
29 ⁵³ See *Sacramento Unified School District v Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994), wherein the
Court established a four factor balancing test to evaluate whether a change in placement should be made.

30 ⁵⁴ See *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir, 1995), wherein a 280 mile commute was appropriate as the
closest location for a proper placement.

1 7. A parent who files for a due process hearing alleging non-compliance with
2 the IDEA must bear the burden of proving that claim.⁵⁵ The standard of proof is
3 "preponderance of the evidence," meaning evidence showing that a particular fact is
4 "more probable than not."⁵⁶ Therefore, Petitioner bears the burden of proving by a
5 preponderance of evidence that the proposed placement in the March 5, 2007 proposed
6 IEP does not offer FAPE to Student. Petitioner has not met the burden with regard to the
7 proposed placement at Gompers Center.

8 8. For these reasons, the Administrative Law Judge concludes that
9 Petitioner's due process complaint must be denied and the District's proposed IEP is
10 affirmed, encompassing Student's educational placement at Gompers Center and
11 including the related transportation service.

12 **ORDER**

13 Based on the findings and conclusions above,

14 IT IS HEREBY ORDERED that the relief requested in Petitioner's due process
15 complaint is **Denied**.

16 Done this 21st day of November, 2007.

17
18 OFFICE OF ADMINISTRATIVE HEARINGS

19 


20 Kay A. Abramsohn
21 Administrative Law Judge
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23
24
25
26
27

28 ⁵⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ⁵⁶ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No.*
J-84984, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this Decision and Order is the final decision at the administrative level. Furthermore, any party aggrieved by the findings and decisions made herein has the right to bring a civil action, with respect to the complaint presented, in any State court of competent jurisdiction or in a district court of the United States. Any action for judicial review must be filed within 90 days of the date of the Decision or, if the State has an explicit time limitation for bringing this type of action, in such time as the State law allows.

Copies e-mailed this 21st day of November, 2007, 

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By 